No. 18437

United States
COURT OF APPEALS
for the Ninth Circuit

BUCK WITT,

Appellant,

-vs-

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Appeal from the Judgment of the United States District Court for the District of Oregon

HON. JOHN F. KILKENNY, Judge

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Appeal from the Judgment of the United States District Court for the District of Oregon

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I. STATEMENT OF PLEADINGS AND FACTS CONFERRING JURISDICTION

On the 15th day of September, 1961, the plaintiff, Buck Witt, filed his Complaint in the United States District Court, for the District of Oregon, alleging therein that the action was brought under the provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b) (R. 1), which section confers upon the United States District Court exclusive jurisdiction of actions against the United

States under the Federal Tort Claims Act. The jurisdiction of the Court of Appeals for the Ninth Circuit to review the judgment of the United States District Court in the instant case is grounded upon the provisions of 28 U.S.C. §§ 1291 and 1294. Thereafter, defendant's Answer was filed December 19, 1961, with the Clerk of the District Court, a true copy thereof being served by mail upon counsel for plaintiff. A Pre-Trial Order was lodged on the 24th day of May, 1962, and on the same date an Order was entered segregating the issue of liability from the issue of damages and setting July 11, 1962, as the trial date on the segregated issue of liability only.

II. STATEMENT OF THE CASE

A. History of Pleadings

Plaintiff, in his Complaint, alleges that he is a resident of Clackamas County, Oregon, within the District of Oregon, and that on May 8, 1961, Lt. Richard Ballweber, an employee of the defendant in the United States Army, negligently piloted a United States Army airplane several times over mink sheds owned by plaintiff and located on plaintiff's property. Plaintiff further alleges that, at the above time and place, Lt. Ballweber was acting within the scope of his employment in that he was operating an airplane owned by the United States Army in the course of flight training, and that as the result of the several passes made over the mink sheds, plaintiff suffered severe loss to his kitten crop

plus damage to 150 breeder mink. Plaintiff demanded judgment against defendant in the sum of $30,566.00, and costs.

Defendant's Answer alleges, as a first defense, that the United States District Court does not have jurisdiction for the reason that the acts alleged in the Complaint do not constitute a claim for which the United States, if a private person, would be liable to plaintiff in accordance with the law of the place where the allegedly negligent or wrongful acts or omissions occurred. The second defense contained in defendant's Answer alleges that the Complaint fails to state a claim upon which relief can be granted against this defendant. The third defense contained in said Answer denies Paragraphs II, III, IV and V of Plaintiff's Complaint, except said Answer admits that Clackamas County is within the District of Oregon, admits that Lt. Ballweber was an employee of the United States Army on May 8, 1961, admits that on said date Lt. Ballweber did operate an airplane in the United States Army, and said Answer prays that judgment be entered dismissing the Complaint, and asking for costs and disbursements in this action.

The agreed statement of facts contained in the Pre-Trial Order includes a statement that on May 8, 1961, an Army airplane, to-wit: A U1-A de Haviland Otter, No. 57-6133, made certain flights under the control and command of Lt. Ballweber in the vicinity of the Jack Lenhardt airstrip, said flights being to the east and north of said strip, and that plaintiff's mink ranch is located

approximately one mile northeast of said airstrip. The agreed statement of facts includes a further statement that on May 5, 1961, Lt. Ballweber was authorized and directed by his Command at Fort Carson, Colorado, to fly said U1-A aircraft to the Army installation at Yakima, Washington, deliver certain cargo there and to return to Fort Carson on or about May 8, 1961, and that 2/Lt. Walter Wood and SFC J. G. Kuhn were ordered and directed to accompany Ballweber to Yakima and return. The respective contentions of plaintiff and defendant are then set out in the Pre-Trial Order at pages 3 thru 9 of the Pre-Trial Order (R. 7-12 inc.).

Briefly summarized, plaintiff's contentions are as follows: That Lt. Ballweber, as first pilot and plane commander, had discretion to select the stopover points for refueling and overnight lodging while engaged in the performance of a cross-country mission. That one of the overnight stopover points chosen by Ballweber was the Lenhardt sod airstrip located approximately one mile southwest of plaintiff's mink farm, where the aircraft was tied down on the night of Sunday, May 7, 1961.

The following afternoon, Monday, May 8, 1961, pilots Ballweber and Wood engaged in active training and instruction consisting of a number of power-on approaches and landings on the Lenhardt sod airstrip. That said pilots, chargeable with knowledge of the minimum flight altitudes and standard aircraft landing patterns at civilian fields, as prescribed by Civil Air Regulations, were negligent in the piloting and operation of the aircraft in that they flew the same below the minimum altitudes prescribed by said Regulations, and, in

particular, they piloted said aircraft at altitudes of less than 500 feet directly over plaintiff's mink sheds, barn and house several times, without any cause or justification and in violation of the Civil Air Regulations, and that such flights were outside of and below the established flight and landing patterns for the aforementioned airstrip, and that they failed to exercise reasonable and proper care and control over the noise created by their aircraft as it flew on several occasions over plaintiff's property at altitudes of less than 500 feet, carrying maximum power and manifold pressure and propeller pitch settings, and that as the direct result of such conduct on the part of the two pilots, plaintiff sustained substantial loss and damages to his mink crop and breeder minks, said animals being caused to react in their characteristic manner of panicking in response to loud, unexpected noises and shadows, destroying and miscarrying their young kittens, and that said loss and damage would not have occurred but for the excessively low and loud flights by defendant's aircraft over plaintiff's property.

Plaintiff further contended that pilots Ballweber and Wood were acting during the course of their employment and commission by defendant and within the scope thereof on the afternoon of May 8, 1961, during the flights over plaintiff's property, and that defendant is therefore legally responsible for the negligent conduct on the part of the pilots, plaintiff sustaining damages in the amount of $30,566.00, as itemized at page 5 of the Pre-Trial Order (R. 9).

Defendant, in brief, contended that the flight crew

under the command of Lt. Ballweber disobeyed flight orders and flew from Yakima southwesterly into the State of Oregon in order that two of the three crew members could visit in their respective homes for two nights and one day, and that the flight into Oregon was solely for personal reasons and had no relationship to the ordered flight and accordingly said flight constituted a departure from the scope of the employment of Ballweber and his crew members and that any and all acts performed by Ballweber or others under his command during this period of deviation were and are acts done outside the scope of employment by the defendant. Defendant made certain other contentions, relating to the alleged assumption of risk by plaintiff in moving from a place of safety to a place of risk (near the Lenhardt airstrip), and further relating to the alleged contributory negligence of plaintiff in failing to warn pilots of airplanes using the Lenhardt strip, and that the conduct on the part of the pilots employed by defendant on May 8, 1961, was outside the scope of their employment in that they transported civilian personnel on certain flights on that afternoon. Defendant also contended that the District Court lacked jurisdiction for the reason that the acts complained of by plaintiff do not constitute a claim for which the United States, if a private person, would be liable to plaintiff in accordance with the law of the place where the allegedly negligent or wrongful acts or omissions occurred.

On July 11, 1962, the case came on for trial before the Honorable John F. Kilkenny, District Judge, at the United States Court House, Portland, Oregon, on the

segregated issue of liability only. After hearing the testimony and receiving the evidence of plaintiff and defendant, the Court made its Findings of Fact and Conclusions of Law on July 12, 1962, summarized briefly as follows:

Lts. Ballweber and Wood, and SFC Kuhn, were directed to fly from Fort Carson, Colorado, to Yakima, Washington, to deliver certain cargo at Yakima and to return to their duty statution on or about May 8, 1961. Upon the delivery of the cargo in Yakima on Sunday, May 7, 1961, Ballweber flew the aircraft into the State of Oregon, landing at the Lenhardt airstrip, which is approximately 180 miles southwest of Yakima, and then proceeded to Florence, Oregon, where the parents of SFC Kuhn lived, leaving Kuhn there and returning the same evening, Sunday, May 7, 1961, to the Lenhardt strip, located near the home of Ballweber's parents.

During the following afternoon, Monday, May 8, 1961, Ballweber and Wood made many touch-and-go flights at the Lenhardt strip, some of said flights being training flights for Lt. Wood, and one flight for the entertainment of nonmilitary personnel. The Court further found that plaintiff's mink were then in the process of giving birth to their young, and they panicked, destroying their young and themselves, causing plaintiff substantial damage and that this damage was the proximate result of the negligence of the pilots, which findings of negligence are specifically set forth on pages 3 and 4 of the Findings of Fact and Conclusions of Law (R. 21, 22).

Finding of Fact #7 states that at the time and place

of this incident, Ballweber and Wood were not acting in the line of their employment with defendant and were acting outside the course and scope of their employment with the Department of the Army. To this Finding of Fact, plaintiff takes exception and assigns as error this Finding and the related Conclusion of Law #1 (R. 23), which again states that Ballweber and Wood were not acting in the line of duty, nor within the course or scope of their employment with defendant, and therefore the negligence of said persons is not imputed to the defendant.

A Judgment Order based on the Findings of Fact and Conclusions of Law made by the Honorable John F. Kilkenny, dated July 12, 1962, was signed by Judge Kilkenny and filed with the Clerk on said date, dismissing plaintiff's Complaint and awarding costs to defendant (R. 24).

Plaintiff filed his Motion for Rehearing, for Opening Judgment, for Amended or New Findings of Fact and Conclusions of Law, and For an Order Directing Entry of a New Judgment on July 20, 1962, and on the same date plaintiff filed certain Objections to defendant's Cost Bill, which defendant had filed on July 17, 1962. Plaintiff's Motion came on for hearing on September 17, 1962, at which time an Order was entered directing counsel to submit their respective arguments by brief. Thereafter, plaintiff filed with the Court his Brief in Support of Motion, defendant filed his Answering Brief, and plaintiff subsequently filed his Reply Brief, and on October 19, 1962, an Order signed by the Honorable John F. Kilkenny was entered, denying plaintiff's Motion (R. 29).

On November 21, 1962, plaintiff filed his Notice of Appeal from the final Judgment entered July 12, 1962, and from the Order denying Plaintiff's Motion entered October 19, 1962. In said Notice, plaintiff appealed from Findings of Facts Nos. 4, 7 and 9, and Conclusions of Law Nos. 1, 2 and 3 (R. 30).

B. Questions Presented for Decision on Appeal

The questions presented before decision on this appeal are as follows:

1. Were pilots Ballweber and Wood acting within the scope and course of their employment by the United States Army, one of the departments of defendant, on Monday, May 8, 1961, when they piloted Army aircraft No. 57-6133 immediately above plaintiff's mink ranch on several occasions, so as to make their negligent conduct imputable to defendant, under the applicable rules of the respondeat superior doctrine as expounded by the Oregon Supreme Court?

2. Did defendant ratify the negligent conduct of pilots Ballweber and Wood on May 8, 1961, by subsequently paying to said pilots per diem allowance for said day, paying for the fuel they purchased and consumed on said date, giving credit to each pilot for the specific training accomplished and reported on said date, and failing to take any disciplinary action against either pilot, notwithstanding defendant's actual knowledge of and investigation of the incidents which occurred May 8, 1961?

C. Appellant's Statement of Facts

On Saturday, May 6, 1961, 1/Lt. Richard Ballweber, 2/Lt. Walter Wood and SFC Kuhn department from Fort Carson, Colorado, where they were attached to the 16th Sky Cavalry, United States Army Missile Command, in one of the squadron aircraft, designated a U1-A de Haviland Otter, under orders to deliver certain cargo to the Army Firing Center at Yakima, Washington, and to return on or about May 8, 1961. Their orders called for a departure on Friday, May 5, 1961; however, due to excessive wind conditions at Fort Carson on Friday, May 5, their departure was delayed one day.

After spending Saturday night in Walla Walla, Washington, where the three men stayed as guests of the brother of Lt. Ballweber, they proceeded on Sunday to the Firing Center at Yakima, delivered their cargo and then flew to the Lenhardt airstrip, approximately 25 miles south of Portland, Oregon. The Lenhardt field consists of a sod strip running in a northeast-southwest direction, approximately 2300 feet in length, and located approximately one mile southwest of plaintiff's mink ranch. The plane landed at the Lenhardt strip for approximately 15 or 20 minutes during the latter part of Sunday afternoon, May 7, 1961, and then was flown by Lt. Ballweber to Florence, Oregon, where he and Lt. Wood left SFC Kuhn, whose parents resided in Florence. Ballweber and Wood returned to the Lenhardt strip, landing there after sunset and tied the plane down for the night. The parents of Lt. Ballweber have their

home approximately four miles from the Lenhardt airport. Ballweber and Wood spent the night at the home of Ballweber's parents.

On the following day, May 8, 1961, Ballweber and Wood arrived at the Lenhardt strip at approximately 11:00 a.m., and between that time and approximately 4:00 p.m., they made a number of local flights in the following sequence, according to the testimony which appears at pages 99, 100, 120 and 121 of the Transcript: They first made a 30-minute flight carrying non-military personnel out to the nearby Cascade Range and back. They landed, discharged the civilians, then flew over to Newberg, approximately 15 minutes flying time from the Lenhardt strip, where they purchased aviation fuel with an Army credit card. On the return from Newberg, they landed at the Portland International Airport, where Lt. Ballweber made inquiry at the National Guard Headquarters about the possibility of joining the Army National Guard unit there after his release to inactive duty in August, 1961. From the Portland Airport, they flew down to the Aurora airstrip, an inactive, asphalt-surface strip located in Clackamas County. Here they executed a series of "touch-and-go" landings for the purpose of giving to Lt. Wood transitional training in power-on approaches. They then returned to the Lenhardt strip.

Between 4:00 p.m. and 6:00 p.m., Ballweber and Wood, alone in the aircraft, continued with more transitional training, engaging in a number of "touch-and-go" power-on landings, landing in the direction of southwest.

The testimony of Ballweber and Wood indicates that the purpose of these landings was to train 2/Lt. Wood, who was at that time not checked out in the Otter (Tr. 100, 121, 122). This type of transitional training was the principal assignment of Lt. Ballweber in his squadron at Fort Carson, Colorado. He testified that he was the only instructor pilot in his squadron and that he was scheduled to be released to inactive duty in August of 1961, and that eight pilots had been assigned to him for necessary transitional training in the U1-A. He testified:

> "I was the only instructor pilot, and I was due to get out in August. I had eight people to rush through, so I did. . . . Usually the Army has the problem of transition training because people leave for schools, and a lot of people have the problem of getting checked out into the aircraft there. So that was my primary job, of checking out people prior to leaving the service." (Tr. 156)

The testimony on the part of plaintiff's witnesses who observed the flights which occurred between 4:00 p.m. and 6:00 p.m. on Monday, May 8, 1961, was that the flights were generally from the south to the north and directly over plaintiff's property, and some of plaintiff's mink sheds, and that the altitude of said flights was estimated variously at between 100 and 300 feet. The plaintiff testified that from where he was standing on his property, he was able to see the tops of fir trees, the height of which he estimated to be about 100 feet, the grove being located approximately a quarter of a mile southeast of his mink sheds, over the aircraft as it passed over his property.

The testimony on the part of Lts. Ballweber and Wood was that at no time during that afternoon was their altitude less than 500 feet above the ground while on the downwind leg in the flight pattern described by their aircraft.

Plaintiff's witnesses testified that his mink became hysterical in response to the low-flying, loud aircraft which passed over the sheds on several occasions, and the mink reacted in their characteristic manner of destroying and miscarrying their kittens. Plaintiff telephoned the airport to advise Lenhardt of the problem and to request that the flights cease. Both Ballweber and Lenhardt testified that when Ballweber learned of this phone call made by the plaintiff, he and Lt. Wood immediately took off downwind, in a northeasterly direction, turned to the right and flew their aircraft to another field approximately 10 miles away at Mulino in Clackamas County, where they tied the aircraft down for the night of May 8-9. Plaintiff testified that the direction of this flight was different from that of the previous flights, but that it was also at an excessively low altitude over his mink sheds.

The following morning, May 9, 1961, Ballweber and Wood departed Mulino, flew to Eugene, where they picked up SFC Kuhn, and Ballweber testified that they had intended to continue south through Klamath Falls and Salt Lake City, but that they did not pursue this tentative route because of the weather between Eugene and Klamath Falls, and therefore flew back to Portland and up the Columbia River Gorge to The Dalles (Tr.

153). They landed at their home base, Fort Carson, later the same day.

Thereafter, the Army conducted an investigation (Tr. 134, 148, 171) as the result of the claim made by plaintiff. Lt. Ballweber testified that no disciplinary action was taken against either himself or Lt. Wood as the result of the incidents which occurred on May 8, 1961. The pilots also testified that they reported the transition training given by Lt. Ballweber to Lt. Wood on that occasion, and each received credit for the flying time, landings and training in their respective flight logs. Each pilot made claim for and was paid per diem allowance for each day of the trip.

III. SPECIFICATION OF ERROR NO. 1

The trial court erroneously concluded that pilots Ballweber and Wood were acting outside the scope of their authority and not in the course of their employment and were on an independent "lark" of their own May 8, 1961, when the flights which caused loss and damage to plaintiff's property occurred.

Point I.

In the Ninth Circuit, the law of the place where the accident or loss occurred is to be applied to determine not only whether the act complained of constituted negligence or actionable wrong, but also whether in doing the act, the employee of the United States was acting within the scope of his employment.

AUTHORITIES

O'Connell vs. U.S., 110 F. Supp. 612, at 614 (ED Wn. 1953).
Murphy vs. U. S., 179 F.2d 743 (9th Cir. 1950).
U.S. vs. Johnson, 181 F. 2d 577 (9th Cir.).
U.S. vs. Wibye, 191 F.2d 181 (9th Cir.).

POINT II.

The test for determining the vicarious liability of the master under the doctrine of respondeat superior in this jurisdiction is: Was the servant at the time of the negligent act or omission acting in furtherance of his master's business?

AUTHORITIES

Dalrymple vs. Covey Motor Co. (1913), 66 Or. 533, at 538, 540 and 541, 135 Pac. 91.
Tyler vs. Moore, 111 Or. 499, at 509, 226 Pac. 443.

POINT III.

The trial court erroneously interpreted and applied to the instant case the Oregon case of *Crosby* v. *Braley & Graham,* 171 Or. 72, 134 P.2d 110, stating incorrectly in its verbal opinion given at the conclusion of the trial of the instant case (Tr. 214), that the *Crosby* case holds that, in Oregon, it is not sufficient merely to show that the master's business was being furthered in order to impose vicarious liability on the master.

ARGUMENT

The undisputed testimony is that the loss and damage sustained by plaintiff on May 8, 1961, occurred between the hours of 4:00 p.m. and 6:00 p.m., during which time 1/Lt. Ballweber was giving what he described as transitional training to 2/Lt. Wood, said training consisting of the execution of a series of "power-on, touch-and-go" landings upon the sod airstrip owned by Lenhardt (Tr. 100, 101, 118, 122, 123, 181). Lt. Ballweber testified that this type field was ideal for acquiring experience and skill in the performance of the very mission which has been assigned to the aviation branch of the United States Army: low-altitude support of ground troups, which very often requires Army aircraft to land on short, unimproved, or sod, strips (Tr. 103, 104). Lt. Wood was not checked out in the U1-A Otter. Lt. Ballweber was an instructor pilot, whose primary flying assignment in his squadron at Fort Carson, Colorado, was to give transitional training to the newer pilots coming into the squadron, prior to Ballweber's release to inactive duty scheduled for August, 1961. In short, these two officer-employees of defendant were engaged upon the very activity which they were hired by defendant to perform at the time that the negligent conduct occurred: flying an Army aircraft for transitional training purposes.

The questions whether the employment relationship was suspended at such time as these pilots flew into Oregon on Sunday, May 7, 1961, and whether such relationship was suspended during the flight from the Len-

hardt airstrip to Florence and return during the latter part of the afternoon of Sunday, May 7, are irrelevant under the particular facts in the instant case. The essential question is whether the employment relationship between these pilots and the defendant was in effect between the hours of 4:00 p.m. and 6:00 p.m., Monday, May 8, 1961, during which time they were engaged in active flight training, each carrying out his specific duty assignment and function as flying officers and employees of defendant. Defendant contends that the employment relationship was terminated at the instant that the aircraft was flown into Oregon for the personal purpose of paying family visits to the parents of Ballweber and Kuhn. Even conceding for purposes of argument that the employment relationship was at that time suspended, it is urged by plaintiff that the trial court erroneously considered the relationship suspended at the time when plaintiff sustained his loss—4:00 to 6:00 p.m., Monday, May 8, 1961. The activity of these individuals at that time re-established the relationship, even if this relationship had been temporarily suspended the previous day, because on May 8, from 4 - 6:00 p.m., the activities of the pilots were in furtherance of the business of their employer.

This training activity being engaged in during the latter part of the afternoon of May 8, 1961, was of direct benefit to the employer. It is immaterial that the training took place upon a sod airstrip in the northwest part of the State of Oregon, rather than upon a sod airstrip in the vicinity of Fort Carson, Colorado.

The case of *Dalrymple v. Covey Motor Co.,* supra, at 538 and 540, recites the applicable rule as follows:

> "Upon the main question we note that in Barry's Automobile Law, at page 134, it is stated. 'In determining whether a particular act was committed by a servant within the scope of his employment, the decisive question is: Was he at the time doing anything in furtherance of his master's business? If he was, the master is responsible.' (citing 67 A. 429, 90 NE 392)
>
> "If the servant at the time of the injury was engaged in the performance of an act which, if continued until its completion, would have furthered the master's business and been within the scope of the servant's employment, the master would be liable *even though the act occurred at a place to which his duty did not necessarily call him.* (italics supplied) (p. 540).
>
> "We quote from Shearman & Redfield on Negligence, (5Ed), § 146: 'The master is responsible for the negligent acts or omissions of his servants in the course of their employment, though unauthorized or even forbidden by him, and although outside of their "line of duty", and without regard to their motive.' And the master cannot escape liability even though the acts of his servant were unauthorized, willful and wrongful. I Shearman & Redfield, Negl. (5Ed), § 150."

It is significant that in the *Covey* case, the servant, Harrington, was engaged in the performance of the driving duties which had been assigned to him, but his employer, Covey, contended that the employer was not responsible for Harrington's negligence because, at the time, the owner of the car being operated by Harrington had instructed him to drive to certain places to pick up merchandise which the owner had purchased the

day previous. Answering this contention of Covey, the Supreme Court held that although the servant was carrying out the purely personal instructions of the owner of the car, he was, nevertheless, doing the very thing which Covey hired him to do at the time of the accident in question. Similarly, although Ballweber was in Canby on May 8, primarily to visit his parents—not an uncommon practice among Army pilots on service missions as shown by the testimony of all three pilots—he was, nevertheless, at the specific time the damage to plaintiff occurred doing the very thing he was employed by the Army to do—giving transitional training and instruction to a fellow pilot. Had there been no "power-on" approach training given that day, it is very probable that plaintiff would not have been damaged, since the testimony shows that the damages occurred during the latter part of the afternoon when the training flights took place and not earlier when the civilians went up and when a standard flight pattern was used.

The Oregon Supreme Court again enunciated the applicable rule in the case of *Tyler* v. *Moore,* supra, at page 509:

> "We take it that the true test of whether a master is liable for the act of his servant is whether the servant at the time of the commission of the injury was performing a service for the master in furtherance of the master's business, not whether it was done in exact observance of detail prescribed by his employer. In the case of *Healy* vs. *Johnson,* 127 Ia. 221, at 226 (103 NW 92, at 94), the Supreme Court of Iowa says: 'The doctrine of respondeat superior is not limited to the acts of the servant done with the express or implied authority

> of the master, but extends to all acts of the servant done in discharge of the business entrusted to him, even though done in violation of his instructions' ".

Thus, even though the transitional instruction which Ballweber was giving to Wood at the time of plaintiff's damages was taking place at an unauthorized field, it is clear from the above citation of Oregon authorities and under the general rule that a violation of a specific instruction is not sufficient to terminate the master-servant relationship or to permit the master to avoid liability for the negligence of his servant, *if, at the time of the wrong complained of,* the servant was engaged in the furtherance of the master's business, as was the case here.

The Oregon Supreme Court early laid down the above rule that the master is liable for the acts of his servants done within the scope of their authority, although the servant disobeyed instructions:

> "If done within the scope of the herder's employment, the latter (that is, master) is liable for his acts, although they are willful and intentional . . . It is said to be a universal rule that whether the act of the servant be of omission or commission, whether his negligence, fraud, deceit, or perhaps even willful misconduct occasioned the injury, so long as it be done in the course and scope of his employment, his master is responsible in damages to third persons, and it makes no difference that the master did not give special orders; that he did not authorize or even know of the servant's act or neglect; or even though he disapproved or forbade it, so long as the act was done in the course of the servant's employment, he (the master) is nonetheless liable. . . . There is no such rule of

law as that the master is not liable for the willful and wrongful acts of his servant though such a doctrine has often been propounded in judicial opinions. There are many cases in which a master must be held liable for such acts; and there are numerous decisions holding him so liable which commend themselves to every man's sense of justice. The true ground upon which a master avoids liability for most of the willful acts of his servants, when unauthorized by him, is that they are not done in the course of the servant's employment. When they are so done, the master is liable for them." *French* vs. *Cresswell,* 13 Or. 418, at 425 & 426 (1886).

The latter case of *Newkirk* v *Oregon-Washington Ry. Co.,* (1929) 128 Or. 28, at 38 et seq., 273 Pac. 707, affirming a judgment for plaintiff for injuries resulting from the act of a brakeman employed by the defendant railroad in forcibly ejecting the plaintiff, a trespasser, from one of defendant's flatcars, held:

> "We also believe that the trend of modern authorities is toward holding a railroad more strictly to account for the conduct of its employees. . . . In most cases where the employer has been held liable for the negligence or tortious act of the employe, the employee acted not only without express authority to do the wrong, but in violation of his duty to his employer. . . . But when an em-employee does, in the course of his employment, a duty in an improper manner, his employer is liable for any consequent injury, even though the employee disobeys his orders."

The instant case does not involve the conduct of a military employee while off duty or on leave. Rather, it involves the conduct of a commissioned flying officer engaged in the performance of his specific flying and training duties while under express orders from his

commanding officer. Inherent in the nature of the flying duties of military personnel, in general, and in the non-specific language of the flying orders, in particular, is the recognition that commissioned flying officers employed by the military must necessarily have and do have a wide latitude and discretion in the performance of their duties and in the choice of their route and stopover points. The established custom and practice among flying military officers bears out the exercise of a wide degree of latitude in their choice of route and stopover points (Tr. 147, 182, 183, 184). If this were a case of a non-flying, unqualified military or civilian employee, flying or attempting to fly a Government airplane, then perhaps the Government contention that Ballweber was outside the scope of his employment would have merit. However, the law is abundantly clear, as indicated in the Oregon and other authorities cited above, that a master or employer is liable for the wrongful conduct of his employee or servant done within the scope of his employment, even though the particular conduct violates an express order of the employer, or the employee disobeys the express directions or instructions of his employer. *French* v. *Cresswell,* supra; *Newkirk* v. *Oregon-Washington Ry. Co.,* supra; *Fetting* v. *Winch,* 54 Or. 600 (1909), 104 Pac. 722.

With reference to the Court's finding of fact No. 9, which plaintiff contends is erroneous, the law seems quite well settled in Oregon that plaintiff, upon proof of ownership of the vehicle involved in the wrongful conduct by the employer-defendant, raises an inference or presumption of agency, which causes the burden of

proof on the question of agency to shift to the defendant; that is, upon such proof, it becomes the burden of defendant to show by a preponderance, or greater weight, of the evidence that there was no master-servant relationship in effect.

> "Where the facts are undisputed, the question of whether the master-servant relationship exists is one of law for the court to decide, but where the facts are disputed, this is a jury question." *Barry* vs. *Oregon Trunk Rwy.,* 197 Or. 246, at 255 (1953), 253 P.2d 260.

Larkins v. *Utah Copper Co.,* 169 Or. 499, 127 P.2d 354 (1952); *Houston* v. *Keets Auto Co.,* 85 Or. 125, at 129 (1917), 166 Pac. 531; *Judson* v. *Beehive Auto Service Co.,* 136 Or. 1 (1931); Annotated 74 A.L.R. 944; *Kahn* v. *Home Telephone & Telegraph Co.,* 78 Or. 308, 314, 152 Pac. 240.

In view of the analagous factual situation involved in *Murphy* v. *U.S.,* supra, the decision of this court in that case is not only applicable, but controlling in the instant case. This court will recall that in *Murphy,* a Sgt. Brander was authorized by his commanding officer to drive an Army truck from the army radar camp into the town of Klamath each night for "entertainment, movies, etc." However, Brander's commanding officer testified that he, Brander, was not "free" to use the truck in town during the evening. After driving in with the men and parking the truck, Brander, accompanied by a fellow sergeant, got into the truck and was driving to an Indian dance approximately three blocks away. En route, they stopped to pick up two

lady friends of the other sergeant. They then proceeded, accompanied by the lady friends, to cross a bridge which had no side or hand rails, and while crossing, Brander negligently swerved, causing plaintiff's decedent to fall off the bridge resulting in her death. Although the District Court found that Brander was not acting within the scope of his employment at the time of the negligent act, on appeal by the plaintiff, the Circuit Court reversed, holding that Brander, at the time of the accident, was acting within the scope of his employment, and accordingly found the United States was liable to the plaintiff.

In the instant case, Lt. Ballweber, like Sgt. Brander, had come to a field which was not listed as an authorized field for use by Army aircraft, just as Sgt. Brander had driven the truck to an unauthorized part of the town of Klamath. Also, earlier in the day of May 8, 1961, Lt. Ballweber, like Sgt. Brander, carried unauthorized civilian personnel in Government equipment. Likewise, Ballweber was at the time of the act in question engaged in the performance of the general class or type of duty which he was employed by the Army to perform, namely flying military aircraft. His testimony and that of his co-pilot, Lt. Wood, is that he was engaged in transitional training flights for the specific purpose of checking out Lt. Wood in the execution of power-on approaches and landings at a sod airstrip. His activity constituted the performance of the very duty which Lt. Ballweber was assigned to in his squadron, and for this purpose, the use of the Army aircraft piloted by Ballweber was impliedly, if not expressly, au-

thorized by his employer. The mere fact that he may have disobeyed a specific instruction not to carry civilian passengers, or not to land at unauthorized fields, is not, under the controlling case law of Oregon, as announced in the cases cited above, nor in the rules enunciated by this Court in the *Murphy case,* in and of itself sufficient to terminate the master-servant relationship or to take pilot Ballweber outside the scope of his employment by the United States. Transitional training flights, whether conducted at Ballweber's home base in Colorado, or in Oregon, served and benefited the over-all training purposes of Ballweber's employer. It is not required that the employer be the exclusive beneficiary of the acts in question. Each of the flights which occurred between 4:00 and 6:00 p.m., May 8, 1961, in the instant case, contain an ingredient of benefit to the employer consisting of further training and experience by the two pilots. The liability of the Government is not vitiated by evidence, if any, that Ballweber may have been jointly and concurrently deriving some kind of personal benefit along with the benefit which accrued to his employer during the flights in question.

The Court, in its oral opinion given at the conclusion of the trial, made reference to the Oregon case of *Crosby* v. *Braley & Graham*, supra (Tr. 213, 214). The case appears to be readily distinguishable from the instant case on the facts. In the *Crosby* case, the servant had a fixed place of employment—the used car lot of the defendant. The master-servant relationship between the servant, Handel, and the defendant-employer com-

menced when Handel arrived at the lot and ceased when Handel departed from the lot. Handel drove his own car, paid for its upkeep and gasoline, and his employer exercised no control over Handel when he was away from the defendant's premises. In our case, Ballweber was a flying officer employed by the United States Army, on duty 24 hours each day, except when on leave, and at the time of this incident, was under orders covering the four-day period between May 5 and May 9, 1961. The very nature of his work—flying—took him away from his "place of employment", Fort Carson, Colorado. Moreover, as a pilot and commissioned officer, he was invested with a large degree of discretion and latitude in his selection of route, as shown not only by his testimony, but by that of Lt. Wood and Terpstra. The established custom and practice with reference to choice of route, stopovers and visits to home while on a mission is significant in this case and is, of course, totally absent from the *Crosby* case. And lastly. Handel was not doing that which he was hired by the defendant to do when the accident occurred, whereas pilot Ballweber was engaged in the doing of the specialized job he was hired to do: flying the aircraft assigned to him, and giving transitional training to a fellow pilot from the same squadron of lower rank and with less experience in this type aircraft.

A diligent reading of the *Crosby* case reveals nothing therein, which states or infers that the rule in Oregon is, as held by the trial court in its verbal opinion (Tr. 214), that a mere showing that the acts of the servant were in furtherance of the master's business is not sufficient

in and of itself to place the servant within the scope of his authority. Counsel is unable to find any Oregon cases subsequent to the *Dalrymple* and *Tyler* cases, supra, which vary the test set down in those cases for determining whether the servant was within the scope of his employment; i.e.: was he acting in furtherance of his master's business? The Oregon Supreme Court has imposed no additional requirement for the application of the doctrine of respondeat superior.

IV. SPECIFICATION OF ERROR NO. 2

The trial court erred in failing to hold that the defendant-appellee ratified the conduct of pilots Ballweber and Wood.

POINT I

Under the doctrine of ratification, which is universally defined as: the taking of action or the failure to take such action, depending on the circumstances, by a principal or an employer with full knowledge of all of the facts, the defendant must be held to have ratified the conduct of Ballweber and Wood during the afternoon of May 8, 1961.

AUTHORITIES

Hinson vs. U.S., 257 F.2d 178 (1958, 5th Circ).
Tauscher vs. Doernbecher Mfg. Co., 153 Or. 152 (1936), 56 P2d 318
35 Am Jur, Master & Servant, §§ 544, 546, 550, 555-558 and 563.

ARGUMENT

The testimony of both Ballweber and Wood shows that the Government and, in particular, the immediate commanding officers of these pilots, had full and detailed knowledge of the incidents of May 8, 1961, at the Lenhardt airstrip as the result of the claim made by plaintiff to the United States Army at Fort Lewis, who in turn contacted the Command at Fort Carson, Coloradio (Tr. 148 and 171).

There is ample testimony showing that an investigation was conducted by the Command at Fort Carson, Colorado, in response to the claim filed by the plaintiff immediately after this incident occurred (Tr. 148, 171, 172), that the defendant-Employer had full and detailed knowledge of the incidents of May 8, 1961, in the local area of the Lenhardt airstrip, and that with such knowledge said defendant-employer paid to each of the pilots their per diem allowance for May 8, 1961, paid the aviation fuel purchased by credit card on that day, gave credit to said pilots for the flight time, landings and other training logged on that date, *and most significantly,* failed to take any disciplinary action whatsoever against either pilot.

Although it is conceded that an employer who fails to discharge an employee who has violated the employer's instructions does not, by such failure, ratify in a legal sense the wrongful conduct of the employee, the special factors characteristic of military service and discipline which distinguish such service from civilian employment, make possible the imposition of a number of

disciplinary measures in circumstances such as are present in this case, such as temporarily suspending flying status of the offending pilot, resulting in his loss of flight pay during the suspension. The remarks in the decision of *Hinson* v. *U.S.*, 257 F.2d 158 (1958, 5th Cir.), at page 181, are appropriate:

> "The uniform code of military justice makes Caption Wescott accountable to the Army for all his actions from the date of his entry into active duty. . . . This article (referring to the UCMJ) is pertinent to demonstrate that it is within the omnipresent power of the military to control the driving activities of its members."

The above, of course, applies with equal or greater strength to the performance of official flying assignments by officers flying aircraft owned by the Department of Defense.

The cases show that ordinarily the doctrine of ratification enters into the master-servant relationship in those instances where the conduct of the employee has been willful; e.g. libel, slander, assault and battery, etc. The only Oregon case on the point which counsel has been able to locate, *Tauscher* v. *Doernbecher Mfg. Co.*, 153 Or. 152 (1936), 56 P.2d 318, involves the tort of assault and battery. It seems probable that if an employer were to take steps to repel the assumption that he had ratified the negligent tortious conduct of an employee, such steps could be and would be most readily taken by military superiors as opposed to civilian employers, since disciplinary action for infraction of regulations is so much more common in the military than in civilian employer-employee relationships. Yet, no

disciplinary action was taken. All of the circumstances indicate a ratification of this conduct. This coupled with the benefits which accrued to the Army in general and the 16th Sky Cavalry Division at Fort Carson in particular, by reason of Lt. Wood's receiving specific training the aircraft in which he needed additional training prior to Lt. Ballweber's departure from the service in a few weeks after the incident, all indicate that the master-servant relationship was not suspended on the afternoon of May 8, 1961, when plaintiff sustained his injuries. See also 35 Am Jur, Master & Servant §§ 544, 546, 550, 555-558 and 563.

V. CONCLUSION

From the foregoing, it is apparent that Ballweber, the commanding officer of the plane, and Wood, his co-pilot and trainee, were acting within the scope of their employment when the damages complained of occurred. The lower court was in error in holding otherwise, and the judgment rendered must be reversed and the matter remanded to the lower court for further proceeding to determine the segregated issue of damages.

Respectfully submitted,

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VI. CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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